STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2010
v	No. 292331 Kalamazoo Circuit Court
JOHN RUSSELL MCLEMORE, Defendant-Appellant.	LC No. 2008-001132-FH

Before: O'CONNELL, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

After a jury trial, defendant John Russell McLemore was convicted of one count of first-degree home invasion, MCL 750.110a(2), and one count of larceny in a building, MCL 750.360. The trial court dismissed a separate count of conspiracy to commit first-degree home invasion, MCL 750.110a(2); MCL 750.157a, after the jury acquitted him of that charge. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to concurrent sentences of 87 to 360 months' imprisonment for the home invasion conviction and one to six years' imprisonment for the larceny conviction, with 31 days' credit for time served. Defendant now appeals as of right. We affirm.

Defendant's convictions arise from his involvement in a home invasion committed in conjunction with his brother-in-law, Jon Kean. On July 9, 2008, defendant and Kean arrived, uninvited, at the home of Guy Bowman and his wife, Jeri, at approximately 10:00 a.m. The couple's two youngest children, a preteen and a young teenager, were alone in the house at the time. When the older of the two children saw the defendant banging on the sliding glass door and both saw Kean break through a window, they grabbed telephones, hid, and called Guy. When Guy learned that unknown individuals were at the house, he asked a neighbor, Ron Miller, to go to the house.

Miller drove to the Bowmans' house and parked his car behind the truck that Kean and defendant were driving. The vehicle was empty, but Miller saw defendant walking from the porch toward the truck. When Miller asked defendant what he was doing, defendant acted in an evasive manner and indicated that he and a companion needed directions. However, defendant refused to leave when Miller told him to do so; instead, he continued to wait outside the house, looking nervous.

Soon thereafter, Miller saw Kean exit the house carrying two jewelry boxes and a crowbar. Kean and defendant returned to the truck and Kean began yelling at Miller and moving his truck toward Miller's vehicle in a manner that indicated that he would hit the vehicle. Miller moved his vehicle in an attempt to avoid escalating the situation, and defendant and Kean sped away. The Bowmans' oldest son, a high-school student, was returning from cross-country practice at the time and witnessed the events in the driveway.

The police tracked the license plate number on the truck to defendant and contacted him shortly after the home invasion occurred. Defendant initially denied involvement in the home invasion, but he later turned himself and Kean in and admitted to his involvement. In particular, he told Detective Jeffrey Baker that after Kean pulled into the victim's driveway, but before actually committing the home invasion, Kean told him that he intended to break into the house and that Kean had asked him to act as a lookout. He also admitted acting evasively when Miller questioned him regarding his presence at the Bowmans' house. Finally, he claimed that after he and Kean escaped, they dumped the jewelry boxes and their contents near an old barn in a rural area. Defendant also admitted that Kean gave him $100 as compensation for acting as a lookout.

However, defendant was evasive when asked to give more details regarding the location of the jewelry boxes. Only after an officer pieced together defendant's cryptic information with his knowledge of the Vicksburg area to identify the barn in question did defendant admit that he and Kean had discarded the jewelry boxes near that location. The officer located the empty jewelry boxes, and defendant then admitted that Kean had pawned some of the jewelry at Lansing-area pawnshops and had sold other jewelry on the street for drugs.

At trial, defendant gave inconsistent testimony regarding his involvement in the home invasion. Initially, he denied being present at the Bowman home or having any involvement in the home invasion, and claimed that he could not recall where he was at the time of the home invasion. However, almost immediately thereafter, defendant admitted that he had been with Kean at the time of the home invasion and that Miller had confronted him outside the Bowmans' home. Defendant then claimed that he thought that Kean went to the Bowmans' house that morning to collect money that was owed him and that he believed that the jewelry boxes belonged to Kean. Defendant also maintained that he planned to go to another house to collect money that he was owed for some construction work and asked Miller for directions. He believed that the police contacted him soon thereafter to arrest him for an outstanding probation violation, and that he decided to turn himself in because he wished to resolve the situation surrounding his probation violation, not because he was involved in the home invasion. He denied telling police investigators that he was involved in the home invasion and claimed that the $100 that Kean gave him was repayment for a past debt.

On appeal, defendant challenges the sufficiency of the evidence supporting his conviction for first-degree home invasion, arguing that the evidence did not establish that he committed the home invasion either directly or under an aiding and abetting theory. We disagree. We review a claim of insufficient evidence in a criminal trial de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

When reviewing a claim that the evidence presented was insufficient to support defendant's conviction, we view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the essential

elements of the crime were established. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). As a result, we are "required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

MCL 750.110a(2) states:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

As our Supreme Court recently noted in *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010), MCL 750.110a identifies several ways in which first-degree home invasion can be committed by providing "alternative elements" that must be established. Each element of first-degree home invasion can be established by satisfying one of two alternatives set forth in the statute. *Id.* The *Wilder* Court broke down the alternative elements of first-degree home invasion as follows:

> Element One: The defendant *either*:
>
> 1. breaks and enters a dwelling or
>
> 2. enters a dwelling without permission.
>
> Element Two: The defendant *either*:
>
> 1. intends when entering to commit a felony, larceny, or assault in the dwelling or
>
> 2. at any time while entering, present in, or exiting the dwelling commits a felony, larceny, or assault.
>
> Element Three: While the defendant is entering, present in, or exiting the dwelling, *either*:
>
> 1. the defendant is armed with a dangerous weapon or
>
> 2. another person is lawfully present in the dwelling. [*Id.*]

Admittedly, Kean, not defendant, directly committed the home invasion. However, the prosecution presented sufficient evidence to permit a reasonable juror to conclude that defendant was guilty of home invasion under an aiding and abetting theory. "'Aiding and abetting' describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (quotation omitted).

> The general rule is that, to convict a defendant of aiding and abetting a crime, a prosecutor must establish that "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement." [*People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *Carines*, 460 Mich at 768.]

Further, a defendant is responsible under an aiding and abetting theory for "crimes that are the natural and probable consequences of the offense he intends to aid or abet." *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006). "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). An aider and abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, the defendant's participation in planning or executing the crime, and evidence of flight after the crime. *Carines*, 460 Mich at 757–758. "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to establish the elements of a crime." *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004). "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

In this case, a reasonable juror could easily conclude that Kean directly committed the home invasion. The evidence presented at trial, largely uncontradicted in defendant's version of the events, indicates that Kean entered the Bowmans' house by forcing open a window and without the family's permission, that he committed a larceny by taking two jewelry boxes and their contents from the Bowmans while inside their home, and that two of the Bowman children were in the home at the time of the invasion.

Second, a reasonable juror could conclude that defendant "performed acts or gave encouragement that assisted the commission of the crime." *Moore*, 470 Mich at 67. Defendant admitted to Baker that he knew that Kean intended to break into the Bowmans' house and steal whatever he could find inside before Kean committed the home invasion, and that Kean told defendant that he wanted defendant to act as a lookout and to inform Kean in some manner if somebody were to approach the house while he was inside. Defendant made no affirmative statement to Kean indicating that he would not act as a lookout or otherwise participate in the home invasion. But, the evidence presented at trial indicated that defendant did take affirmative steps that assisted Kean in his commission of the offense. The Bowmans' youngest children testified that they saw a man matching defendant's physical description emerge from a black truck in their driveway and knock on an exterior door, presumably to determine whether

anybody was home. The Bowmans' daughter also reported hearing a voice say "run, they're here" as she hid in her parents' closet. Miller saw defendant walking from the porch to the truck when he arrived in the Bowmans' driveway, and defendant gave evasive answers and tried to avoid answering Miller's questions when Miller asked why he was at the house. Further, when Miller told him to leave the premises, defendant continued to stand outside the house, looking nervous. He only returned to the truck after Kean emerged from the house with the jewelry boxes and got inside the truck, and the two men only escaped by acting in a threatening manner and then speeding away. The evidence, viewed in a light most favorable to the prosecution, is sufficient to permit a reasonable juror to conclude that defendant was assisting Kean in the commission of the home invasion by determining if anyone was in the house, acting as a lookout while Kean was in the house, warning Kean that someone had spotted them, acting in an evasive manner when confronted by Miller, and joining Kean in a speedy getaway.

Finally, the prosecution presented sufficient evidence to permit a reasonable juror to conclude that defendant either intended the commission of the crime or knew that Kean intended to commit the home invasion at the time defendant gave aid or encouragement. *Id.* at 68. Again, defendant admitted to Baker that he knew that Kean intended to break into the Bowmans' house and steal whatever he could find inside before Kean committed the home invasion, and that Kean told defendant that he wanted defendant to act as a lookout and to inform Kean in some manner if somebody were to approach the house while he was inside. This evidence alone is sufficient to permit a reasonable juror to conclude that, at the very least, defendant knew that Kean intended to commit the home invasion when he aided Kean in its commission. Nevertheless, circumstantial evidence presented by the prosecution further supports the conclusion that defendant either intended the commission of the offense or knew of its commission. Defendant acted in a manner that indicated that he was attempting to discern if anyone was home before Kean broke into the Bowmans' house, to warn Kean that they had been "spotted," and to provide "cover" for Kean by evasively answering Miller's questions while waiting for Kean to leave the Bowmans' house.

Accordingly, the prosecution presented sufficient evidence to permit a reasonable juror to conclude that defendant committed first-degree home invasion under an aiding-and-abetting theory. Although defendant claimed that he thought that Kean was trying to collect on a debt and had no knowledge of the home invasion, the prosecution is under no obligation to negate defendant's theory. *Nowack*, 462 Mich at 400. "The evidence is sufficient if the prosecution proves its theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide," *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991), and the prosecution did so in this case. Defendant's contradictory testimony merely created a question of credibility, which is properly left to the fact-finder. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Defendant also challenges the sufficiency of the evidence supporting his conviction of breaking and entering with intent to commit a larceny. However, defendant was never charged with, or convicted of, this offense. Instead, he was convicted of the separate offense of larceny

in a building, MCL 750.360.[1] Defendant fails to develop any argument that the evidence was insufficient to permit a reasonable jury to conclude that he committed the offense of larceny in a building and, accordingly, we will not consider the issue further.

Next, defendant argues that the trial court's scoring of OV 4 was incorrect because there was insufficient evidence to establish that the Bowmans suffered a serious psychological injury requiring professional treatment. Again, we disagree.

Generally, "[t]his Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). However, because defendant failed to challenge the scoring of OV 4 at his sentencing hearing, the issue is not preserved for our review. Accordingly, we review this allegation of error for plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); *Carines*, 460 Mich at 763-764, 774.

MCL 777.34 governs the scoring of OV 4 and provides, in relevant part, that the trial court assess ten points if the victim suffered a "[s]erious psychological injury requiring professional treatment." MCL 777.34(1)(a). The statute provides, "[s]core 10 points if the serious psychological injury *may* require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2) (emphasis added).

A sentencing court has discretion in determining the number of points to be scored for each variable, provided that the record evidence adequately supports a given score. *Endres*, 269 Mich App at 417. Facts used to support a sentencing variable need only be proven by a preponderance of the evidence. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006). The rules of evidence do not apply to a sentencing proceeding and are not required by due process. *People v Uphaus* (*On Remand*), 278 Mich App 174, 183-184; 748 NW2d 899 (2008); MRE 1101(b)(3). "Thus, when considering a defendant's sentence, a trial court may properly rely on information that would otherwise not be admissible under the rules of evidence." *Uphaus*, 278 Mich App at 184. A sentencing court may consider the contents of the presentence investigation report (PSIR) when calculating the guidelines. *People v Ratkov* (*After Remand*), 201 Mich App 123, 125; 505 NW2d 886 (1993); MRE 1101(b)(3).

Defendant's argument that OV 4 should not have been scored at ten points because nothing in the record indicated that any victim suffered psychological injury requiring

[1] MCL 750.360 states:

> Any person who shall commit the crime of larceny by stealing in any dwelling house, house trailer, office, store, gasoline service station, shop, warehouse, mill, factory, hotel, school, barn, granary, ship, boat, vessel, church, house of worship, locker room or any building used by the public shall be guilty of a felony.

professional treatment is meritless. In his victim impact statement concerning defendant, Guy Bowman wrote:

> My wife and I along with my three children are in shock over this violation. We do not feel safe in our own home. The children are emotionally scarred and don't even feel safe in their own house, or walking around. As teenagers they should be learning some independence and now this has all been taken away from them and us.

More significantly, he noted that his family was seeking counseling and "emotional help" with Desert Stream Christian Counseling Center. The Bowmans' daughter reported that since the incident, she has not felt safe in her own home and would no longer take babysitting jobs because she is "too afraid to be somewhere without an adult that I trust." The Bowmans' sons reported that after the incident, they were scared to be home alone. Defendant fails to identify any evidence contradicting these statements. Accordingly, the trial court did not plainly err when it concluded that Guy, Jeri, and their children were traumatized by the incident and sought psychological help to address the feelings of fear and helplessness that Kean and defendant caused when they broke into their home.

Finally, defendant argues that the trial court failed to consider mitigating circumstances when sentencing defendant and, as a result, he suffered a deprivation of his constitutional rights at sentencing. We disagree. Barring constitutional error, if a sentence is within the appropriate guidelines range, we must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003); *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006).

Defendant raised several factors that he believes the trial court should have considered at sentencing. In particular, defendant argues that the trial court should have considered his poor health to be sufficient to justify a downward departure from the recommended minimum sentencing range. Yet defendant fails provide any authority to support his contention that defendant's poor health, by itself, is sufficient to justify a downward departure in his sentence. Regardless, the trial court did consider that defendant had "a severe cardiac condition, and problems that are attendant to that," but also concluded that in light of the totality of the circumstances surrounding the case, there was nothing substantial and compelling to justify a downward deviation from the sentencing guidelines. Instead, the trial court also considered the particularly egregious nature of the home invasion, in which the two youngest Bowman children were terrorized by a home invasion that occurred when they were alone in the house. The trial court also observed that defendant had an opportunity to abort his plan when Miller confronted him, but chose not to, and noted that defendant was aware of his heart condition when he took part in the lawbreaking in question. The trial court took into account all these considerations when determining that minimum sentences at the halfway point of the recommended range were appropriate. Defendant fails to establish that the court's decision to take defendant's poor health

into consideration but to determine that the totality of the circumstances surrounding the offense did not justify a downward departure constitutes plain error.[2]

Defendant also claims that the trial court should have considered his cooperation with law enforcement authorities to be an acceptable justification for a downward departure from the recommended minimum sentencing range. However, the evidence presented to the sentencing court does not indicate that defendant unequivocally cooperated with law enforcement authorities after the home invasion occurred. Defendant only turned himself in after being contacted by police, and he testified at trial that he turned himself over to authorities shortly after the home invasion because he wanted to resolve his 2008 abscondence from probation, not because he had committed the charged offenses. Further, although defendant willingly talked to authorities, he gave inconsistent and incorrect information, making investigators believe that he was trying to "play games" with them. The trial court did not plainly err when it declined to consider defendant's erratic cooperation with authorities as sufficient to justify a downward departure in his sentence. Similarly, the trial court did not plainly err when it failed to consider any remorse that defendant might have felt for his role in the home invasion as sufficient to justify a downward departure in his sentence.

Defendant claims that the trial court should have considered his addiction to alcohol and marijuana as a justification for a downward departure. However, even assuming we were to find that alcohol and drug addiction justifies a downward departure in a defendant's sentence, defendant provides no evidence that he *has* such addictions. The PSIR indicates that defendant occasionally used marijuana as a teenager and drank alcohol a couple of times a week in the late 1970s. Defendant does not report having used either substance since 1980. The trial court did not plainly err in failing to consider defendant's occasional use of marijuana and alcohol as a youth in the 1970s to be a sufficient justification for a downward departure in defendant's sentence. Further, in light of defendant's successful abstinence from marijuana and alcohol for over 30 years, the trial court's failure to consider drug or alcohol rehabilitation does not constitute plain error.

Next, defendant argues that the trial court failed to address why it decided to sentence defendant as a second-offense habitual offender. However, the trial court indicated that it relied on the PSIR and sentencing guidelines when imposing its sentence and specifically noted on the record that defendant had a prior felony conviction. The PSIR indicated that defendant should be sentenced as a second-offense habitual offender and provided details regarding his past criminal history, including details regarding his 2005 felony conviction on a false pretenses charge. Accordingly, the trial court properly and sufficiently articulated its reasons for sentencing defendant as a second-offense habitual offender. *Conley*, 270 Mich App at 313 ("The articulation requirement is satisfied if the trial court expressly relies on the sentencing guidelines

[2] Defendant also claims that the trial court should have granted a downward departure from the recommended minimum sentence range based on his age, family support, and work history. Yet in his brief on appeal, defendant fails to explain why these considerations justify a downward departure. Accordingly, we will not address this issue further. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

in imposing the sentence or if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines.")

Defendant also argues more generally that his sentence is disproportionate to his offense and highlights that the trial court gave defendant a minimum sentence that was slightly higher than the minimum sentence recommended by the prosecution. Regardless, both sentences are well within the applicable guidelines range and, therefore, are presumed to be proportionate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). The guidelines range was 57 to 118 months' imprisonment for the first-degree home invasion conviction, and the trial court sentenced defendant to a minimum of 87 months' imprisonment for this conviction. The guidelines range was 2 to 21 months for the larceny in a building conviction, and defendant was sentenced to a minimum of 12 months' imprisonment for this conviction. Further, defendant has failed to present any unusual circumstances at sentencing or on appeal to overcome the presumption that the sentence is proportionate. *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995).

Defendant also claims that his sentences violate the principles expressed by the United States Supreme Court in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, because Michigan's sentencing scheme does not permit a trial court to impose a maximum sentence in excess of the statutory maximum, MCL 769.8(1), *Blakely* is not violated when a trial court uses judicially ascertained facts to impose a sentence within the range authorized by the jury's verdict. *Drohan*, 475 Mich at 164. Defendant received a sentence within the statutory maximum, and the trial court's scoring of the prior record and offense variables was appropriate. Accordingly, no *Blakely* violation occurred.

Finally, defendant mentions that his trial counsel's failure to challenge the scoring of OV 4 and the trial court's refusal to consider mitigating evidence might constitute ineffective assistance of counsel. However, defendant provides no argument or citation to authority indicating that his counsel was ineffective. Because defendant has failed to properly establish this claim of error, we need not address it further. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Affirmed.

/s/ Peter D. O'Connell
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro